

**Chapter VI. REPRESENTATION IN FEDERAL DEATH PENALTY CASES AND IN  
FEDERAL CAPITAL HABEAS CORPUS PROCEEDINGS**

**CONTENTS**

	<b><u>PAGE</u></b>
_____6.01 Appointment of Counsel in Capital Cases . . . . .	1
6.02 Compensation of Appointed Counsel in Capital Cases . . . . .	5
6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases . . . . .	8

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, amended 21 U.S.C. § 848(q), in a manner that creates a two-tiered structure for the compensation of counsel and the approval and payment of persons providing investigative, expert, and other services in capital cases. The pertinent provisions of the AEDPA are applicable to capital cases commenced, and appellate proceedings in which an appeal is perfected, on or after the date of enactment of the AEDPA (April 24, 1996). Thus, this chapter retains guidelines applicable to cases that pre-date the AEDPA, and adds, where appropriate, new guidelines for cases subject to the AEDPA. Unless otherwise specified, provisions in this chapter apply to all capital cases.

NOTE REGARDING FEDERAL DEATH PENALTY CASES: Detailed recommendations concerning the appointment and compensation of counsel in federal death penalty cases were adopted by the Judicial Conference on September 15, 1998. Those recommendations, and accompanying commentary by the Defender Services Committee's Subcommittee on Federal Death Penalty Cases, are set forth in Appendix I to this volume. The complete report, entitled *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation*, is available on the judiciary's web site ([www.uscourts.gov](http://www.uscourts.gov)) or from the Defender Services Division of the AOUSC, 202-502-3030.

#### 6.01 Appointment of Counsel in Capital Cases.

##### A. Number of Counsel.

- (1) Federal Death Penalty Cases. As required by 18 U.S.C. § 3005, at the outset of every capital case, courts should appoint two counsel, at least one of whom is experienced in and knowledgeable about the defense of death penalty cases. Pursuant to 21 U.S.C. § 848(q)(4), if necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in such a case. While courts should not appoint more than two lawyers unless exceptional circumstances and good cause are shown, appointed counsel may, with prior court authorization, use the services of attorneys who work in association with them, provided that the employment of such additional counsel (at a reduced hourly rate) diminishes the total cost of representation or is required to meet time limits.
- (2) Habeas Corpus Proceedings. Pursuant to 21 U.S.C. § 848(q)(4), a financially eligible person seeking to vacate or set aside a death sentence in proceedings under 28 U.S.C. § 2254 or 2255 is entitled to appointment of one or more qualified attorneys. Due to the

complex, demanding and protracted nature of death penalty proceedings, judicial officers should consider appointing at least two counsel.

The judicial officer may appoint an attorney, if qualified under paragraph 6.01 C, who is furnished by a state or local public defender organization or by a legal aid agency or other private, non-profit organization to represent a person charged with a capital crime or seeking federal death penalty habeas corpus relief. Such appointments may be in place of, or in addition to, the appointment of a federal defender organization or a CJA panel attorney or an attorney appointed *pro hac vice* in accordance with paragraph 2.01 D of the *CJA Guidelines*. Such appointments should be made when the court determines that they will provide the most effective representation. In making this determination, the court should take into consideration whether the attorney represented the person during prior state court proceedings.

B. Procedures for Appointment in Federal Death Penalty Cases.

- ~~~~~(1) In appointing counsel in federal death penalty cases, the court shall consider the recommendation of the federal public defender, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. In fulfilling this responsibility, the federal public defender organization or Administrative Office should consult with counsel (if counsel has already been appointed or retained) and the court regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation. In evaluating the qualifications of counsel considered for appointment, the federal public defender organization or Administrative Office should consider:
- (a) the minimum experience standards set forth in 21 U.S.C. § 848(q), 18 U.S.C. § 3005, and other applicable laws or rules;
  - (b) the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases;
  - (c) the recommendations of other federal public and community defender organizations, and local and national criminal defense organizations;

(d) the proposed counsel's commitment to the defense of capital cases; and

(e) the availability and willingness of proposed counsel to accept the appointment and to represent effectively the interests of the client.

~~~~~  
Courts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation. Ordinarily, "learned counsel" (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in *state* death penalty trials, appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation.

(2) Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel on Appeal. Ordinarily, the attorneys appointed to represent a death-sentenced federal appellant should include at least one attorney who did not represent the appellant at trial. In appointing counsel the court should, among other relevant factors, consider:

(a) the attorney's experience in federal criminal appeals and capital appeals;

(b) the general qualifications identified in paragraph 6.01 B(1); and

(c) the attorney's willingness, unless relieved, to serve as counsel in any post-conviction proceedings that may follow the appeal.

(3) Federal Death Penalty Cases: Special Considerations in the Appointment of Counsel in Post-Conviction Proceedings. In appointing post-conviction counsel in a case where the defendant is sentenced to death, courts should consider the attorney's experience in federal post-conviction proceedings and in capital post-conviction proceedings, as well as the general qualifications identified in paragraphs 6.01 B(1) and 6.01 C(2).

C. Statutory Attorney Qualification Requirements.

(1) Appointment of Counsel Prior to Judgment. Pursuant to 21 U.S.C. § 848(q)(5), at least one of the attorneys appointed must

have been admitted to practice in the court in which the case will be prosecuted for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court. Pursuant to 18 U.S.C. § 3005, at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.

- (2) Appointment of Counsel After Judgment. Pursuant to 21 U.S.C. § 848(q)(6), at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in felony cases in the court.
- (3) Attorney Qualification Waiver. Pursuant to 21 U.S.C. § 848(q)(7), the presiding judicial officer, for good cause, may appoint an attorney who may not qualify under 21 U.S.C. § 848(q)(5) or (q)(6), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.

D. Continuity of Representation.

- (1) In the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified under paragraph 6.01 C, when the case enters the federal system.
- (2) Section 848(q)(8) of title 21, U.S.C., provides that, unless replaced by an attorney similarly qualified under paragraph 6.01 C pursuant to counsel's own motion or upon motion of the defendant, counsel shall represent the defendant in every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motion for a new trial, appeal, application for a writ of certiorari to the Supreme Court of the United States, all post-conviction proceedings, applications for stays of execution, competency proceedings, proceedings for executive or other clemency, and other appropriate motions and proceedings.

6.02 Compensation of Appointed Counsel in Capital Cases.

A. Inapplicability of CJA Hourly Rates and Compensation Maximums.

- (1) Hourly Rates. Pursuant to 21 U.S.C. § 848(q)(10)(A), **with respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996**, the presiding judicial officer shall set the hourly compensation rate for appointed counsel in an amount not to exceed \$125 per hour for in-court and out-of-court time (unless raised by the Judicial Conference in accordance with section 848(q)(10)(A)).

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996**, in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the Antiterrorism Act, an attorney appointed to represent a defendant charged with a federal capital crime or seeking to vacate or set aside a death sentence in a proceeding under section 2254 or 2255 of title 28, U.S.C., shall be compensated at a rate and in an amount determined exclusively by the presiding judicial officer to be reasonably necessary to obtain qualified counsel to represent the defendant, without regard to CJA hourly rates or compensation maximums.

- (2) Inapplicability of Compensation Maximums. There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases.

B. Attorney Compensation Recommendation.

- (1) In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (see paragraph 6.01 C), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel's general office overhead and to ensure adequate compensation for representation provided.

In consideration of the potential for wide disparity in compensation paid to attorneys in federal death penalty cases and in federal capital habeas corpus proceedings, and for overburdening the Defender Services appropriation, it is recommended that presiding judicial officers limit the hourly rate for attorney compensation to between \$75 and \$125 per hour for in-court and out-of-court time. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996**, the rate

of compensation shall not exceed \$125 per hour for in-court and out-of-court time (unless revised by the Judicial Conference in accordance with 21 U.S.C. § 848(q)(10)(A)).

- (2) If, following the appointment of counsel in a case in which a defendant was charged with an offense that may be punishable by death, it is determined that the death penalty will not be sought, the court may consider the question of the number of counsel needed and the rate of compensation needed for the duration of the proceeding. After considering whether the number of counsel initially appointed is necessary to ensure effective representation or to avoid disruption of the proceeding, the court may continue such appointments or make an appropriate reduction. After considering the need to compensate appointed counsel fairly, taking into account the commitment of time and resources appointed counsel has made and will continue to make, the court may continue to pay the rate previously approved or prospectively reduce such rate.

- C. Interim Payments to Counsel. It is urged that the court permit interim payment of compensation in capital cases. (See generally paragraph 2.30 B concerning interim payments to counsel in death penalty cases.)
- D. Forms. Claims for compensation and reimbursement of expenses for attorneys furnishing services in death penalty proceedings should be submitted on CJA Form 30, "Death Penalty Proceedings: Appointment of and Authority to Pay Court Appointed Counsel."
- E. Review of Vouchers. Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.
- F. Case Budgeting in Federal Capital Habeas Corpus Proceedings and Federal Death Penalty Cases. Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds. Case budgets should be submitted *ex parte* and filed and maintained under seal.
  - (1) The budget should serve purposes comparable to those of private retainer agreements by confirming both the court's and the attorney's expectations regarding fees and expenses.
  - (2) Consideration should be given to employing an *ex parte* pretrial conference in order to facilitate reaching agreement on a litigation budget at the earliest opportunity.

- (3) The budget should be incorporated into a sealed initial pretrial order that reflects the understandings of the court and counsel regarding all matters affecting counsel compensation and reimbursement and payments for investigative, expert and other services, including but not limited to the following matters:

(a) The hourly rate at which counsel will be compensated (see paragraphs 6.02 A and B);

(b) In capital habeas corpus cases: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) for the entire case (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

(c) In federal death penalty cases:

~~~~~ i. Prior to prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the time that the Department of Justice determines whether to authorize the death penalty;

~~~~~ ii. After prosecution decision to seek death penalty authorization: the best preliminary estimate that can be made of the cost of all services (counsel, expert, investigative, and other) likely to be needed through the guilt and penalty phases of the trial (in its discretion, the court may determine that defense counsel should prepare budgets for shorter intervals of time);

iii. Death penalty not sought: as soon as practicable after a decision not to seek the death penalty, the number of appointed counsel and hourly rate of compensation should be reviewed in accordance with subparagraph 6.02 B(2);

~~~~~ (d) Agreement that counsel will advise the court of significant changes (counsel, expert, investigative, and other) to the estimates contained in the order;



~~~~~(e) Agreement on a date on which a subsequent *ex parte* case budget pretrial conference will be held;

(f) Procedure and schedules for submission, review, and payment of interim compensation vouchers (see paragraphs 6.02 C and E);

(g) The form in which claims for compensation and reimbursement should be submitted (see paragraph 6.02 D) and the matters that those submissions should address; and

(h) The authorization and payment for investigative, expert, and other services (see paragraph 6.03).

~~~~~(4) An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.

G. Case Management in Federal Capital Habeas Corpus Proceedings. Judges are encouraged to employ the case-management techniques used in complex civil litigation to control costs in federal capital habeas corpus cases.

6.03 Authorization and Payment for Investigative, Expert and Other Services in Capital Cases.

A. In General. **With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** upon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, the court should authorize the defendant's attorneys to obtain such services. No *ex parte* request for

investigative, expert, or other services in such cases may be considered unless, a proper showing is made by counsel concerning the need for confidentiality.

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996,** in accordance with 21 U.S.C. § 848(q)(9) prior to that provision's amendment by the AEDPA, upon a finding in *ex parte* proceedings that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the presiding judicial officer shall authorize the defendant's counsel to obtain such services on behalf of the defendant.

For all capital cases, upon a finding that timely procurement of necessary investigative, expert or other services could not await prior authorization, the presiding judicial officer may authorize such services *nunc pro tunc* consistent with paragraph 3.02 B.

Except as otherwise specified in paragraph 6.03, the provisions set forth in Chapter III are applicable to the authorization and payment for investigative, expert, and other services in capital cases.

- B. AEDPA Limitation: Inapplicability to Pre-AEDPA Cases. For all capital cases, the compensation maximum set forth in paragraph 3.02 A of these guidelines is inapplicable.

**With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** pursuant to 21 U.S.C. § 848(q)(10)(B), the fees and expenses for investigative, expert, and other services are limited to \$7,500 in any case unless payment in excess of that amount is certified by the court, or magistrate judge if the services were rendered in connection with a case disposed of entirely before such magistrate judge, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). The \$7,500 limit applies to the total payments for investigative, expert, and other services in a case, not to each service individually.

Once payments for investigative, expert, and other services total \$7,500, then additional payments must be approved by the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). Accordingly, the court shall monitor all payments for investigative, expert, and other services.

If it can be anticipated that the payments for investigative, expert, and other services will exceed the statutory maximum, advance approval should be obtained from the court and the chief judge of the circuit (or an active circuit judge to whom the chief judge has delegated this authority). See sample form, Appendix C. Rather than submitting multiple requests, where possible, courts should submit the expert, investigative and other services portion of the approved case budget (see paragraph 6.02 F) to the chief judge of the circuit (or his or her designee) for advance approval.

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996,** in accordance with 21 U.S.C. § 848(q)(10) prior to that provision's amendment by the AEDPA, the presiding judicial officer shall set compensation for investigative, expert, and other services in an amount reasonably necessary to obtain such services, without regard to CJA or AEDPA maximum limitations.

- C. Consulting Services in Federal Capital Habeas Corpus Cases and in Federal Death Penalty Cases. Where necessary for adequate representation, subsection (e) of the CJA and 21 U.S.C. § 848(q)(9) authorize the reasonable employment and compensation of expert attorney consultants to provide “light consultation” services to appointed and *pro bono* lawyers in federal capital habeas corpus cases and in federal death penalty cases in such areas as records completion, determination of need to exhaust state remedies, identification of issues, review of draft pleadings and briefs, authorization process to seek the death penalty, etc. “Light consultation” services are those that a lawyer in private practice would typically seek from another lawyer who specializes in a particular field of law, as opposed to “heavy consultation” services, which include, but are not limited to, reviewing records, researching case-specific legal issues, drafting pleadings, investigating claims, and providing detailed case-specific advice to counsel, if such tasks take a substantial amount of time.

An expert attorney consultant shall not be paid an hourly rate exceeding that which an appointed counsel could be authorized to be paid.

Courts may wish to require that an appointed counsel who seeks to have the court authorize the services of an expert attorney consultant confer with the federal defender, or the Administrative Office’s Defender Services Division if there is no federal defender in the district or if the federal defender has a conflict of interest, regarding who could serve as an expert attorney consultant.

- D. Interim Payments to Persons Providing Investigative, Expert and Other Services. It is urged that the court or magistrate judge permit interim payment of compensation in capital cases.

**With respect to federal death penalty cases and federal capital habeas corpus proceedings commenced, and appellate proceedings in which an appeal is perfected, on or after April 24, 1996,** 21 U.S.C. § 848(q)(10)(B), as amended, provides a \$7,500 payment maximum for the total cost of fees and expenses for investigative, expert, and other services. A special set of procedures for effecting interim payments, including a special memorandum order, must be used in these cases. These procedures and a sample memorandum order are set forth in Appendix F, beginning on page F-11. (See also the case budgeting techniques recommended in paragraph 6.02 F.) Other interim payment arrangements which effectuate a balance between the interest in relieving service providers of financial hardships and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess payment may be devised in consultation with the Defender Services Division of the Administrative Office of the United States Courts.

**For capital cases commenced, and appellate proceedings in which an appeal was perfected, before April 24, 1996,** there are no expert services maximums. A separate set of procedures for effecting interim payments, including a separate memorandum order, must be used in those cases. These procedures and sample memorandum order are set forth in Appendix F, beginning on page F-7.

- E. Forms. Claims for compensation and reimbursement of expenses for investigative, expert or other services in death penalty proceedings should be submitted on CJA Form 31, "Death Penalty Proceedings: *Ex Parte* Request for Authorization and Voucher for Expert and Other Services."
- F. Review of Vouchers. Absent extraordinary circumstances, judges should act upon claims for compensation for investigative, expert, or other services within 30 days of submission.